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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1383

JACK L. ROACH,

Petitioner,

—v.—

STATE OF CONNECTICUT,

Respondent.

PETITIONER'S REPLY BRIEF

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In the compelling First Amendment context of this case, the ostensible procedural deficiencies asserted by respondent are inadequate to foreclose review in this Court of petitioner's federal constitutional claims. See *NAACP* v. *Alabama,* 357 U.S. 449 (1958); 377 U.S. 288 (1964).

On February 5, 1969, when the temporary injunction was issued by the trial court, petitioner immediately moved orally that the injunction be made permanent (T. 103) so that he could take his appeal as of right to the Supreme Court of Connecticut under Sec. 52-263, Conn. Gen. Stats. The motion was denied from the bench (*ibid.*). Petitioner then had three alternatives: (1) follow the regular course of "commonplace type of litigation" (Motion of Respondent to Dismiss, p. 2) by filing an answer to the complaint, await setting of a trial date, undergo another trial on the issues, take an appeal to the Connecticut Supreme Court, await its decision, file a petition for certiorari here, and all the

time labor under the sweeping terms of the injunction; (2) speak out on the public issues concerning the University at the peril of being subjected to prosecution for contempt of the sweeping terms of the injunction and run the risk that, under the uncertain terms of *Walker* v. *Birmingham,* 388 U.S. 307 (1967), he would be unable to challenge the terms of the injunction on constitutional grounds; (3) apply for the extraordinary appeal to the Supreme Court of Connecticut under Section 52-265a, Conn. Gen. Stats., hope that the appeal would be granted, and in the meantime hold his tongue in the expectation that the perfectly obvious constitutional defects of the injunction would be recognized by the Supreme Court of Connecticut and swiftly rectified.

Petitioner chose the last alternative because it promised to accommodate most satisfactorily petitioner's interest in securing the swiftest determination of his First Amendment claims and the competing interest in "orderly judicial review." *Walker* v. *Birmingham, supra* at 320.

However, the Supreme Court of Connecticut defeated petitioner's reasonable expectation that it would recognize that his appeal involved "a matter of substantial public interest and in which delay may work a substantial injustice." Under the circumstances, a petition for certiorari to this Court is appropriate because the order of the Chief Justice of the Supreme Court of Connecticut, denying the application for a Sec. 52-265a appeal, is a "final" judgment rejecting as insubstantial the federal constitutional questions raised by petitioner.

Walker v. *Birmingham, supra,* read together with *Carroll* v. *President and Commissioners,* 393 U.S. 175 (1968), raises

the substantial federal question whether in a case where the First Amendment is intimately involved in the terms of a temporary injunction issued by a state court, state finality rules can effectively be used to delay or frustrate review by this Court.

This case is the other side of *Carroll* coin. This Court decided in *Carroll,* in the interest of the First Amendment rights involved, that the temporal expiration of an *ex parte* injunction could not defeat this Court's power to review its constitutionality because "The underlying question persists . . . " 37 U.S. Law Week at 4042. In the case at bar the underlying question also persists—not because the issue is moot, but because the state will not allow it to become final.

The Court's disposition of the mootness problem in *Carroll* was said to be "particularly appropriate in view of this Court's decision in *Walker* v. *Birmingham* . . . " 37 U.S. Law Week at 4042. It is no less appropriate here, because the threat of *Walker* compels petitioner to obey the terms of an injunction which is self-evidently unconstitutional, but in doing so, as the State would have it, petitioner must also sacrifice for an extended period of time his right to engage in public discussion of important political issues.

The characterization by the State of this case as "a procedurally commonplace type of litigation" is the fundamental misconception upon which its claims must founder. First Amendment rights are "preferred" not "commonplace" and compliance with artificial state procedural rules which may be required in "commonplace" litigation, will not be allowed to interfere with vindication of First Amend-

ment rights. *NAACP* v. *Alabama*, 357 U.S. 449 (1958); 377 U.S. 288 (1964).*

CONCLUSION

For the reasons set forth above and in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

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June 12, 1969

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* Respondent's reference to the recent motion to dismiss it filed in the Supreme Court of Connecticut (Respondent's Motion to Dismiss, p. 8) ought not confuse the Court. There is in fact no appeal now pending in the Supreme Court of Connecticut since the Chief Justice's denial of petitioner's appeal under Sec. 52-265a concluded that procedure. Nor can petitioner take any steps in the Supreme Court of Connecticut to "perfect his appeal pursuant to Chapter 902," the commonplace type of appeal, because such an appeal can be perfected only after the injunction is made permanent. Petitioner has filed in the Supreme Court of Connecticut a memorandum in opposition to the State of Connecticut's motion to dismiss pointing out these inaccuracies.